Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-186

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

JAMES R. WYRSCH
HENRY H. FOX, JR.
1050 Home Savings Building
Kansas City, Missouri 64106
Telephone: (816) 221-0080
Attorneys for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the Missouri Court of Appeals, Kansas City District, dismissing the appeal of appellant, entered on March 3, 1975. On March 31, 1975 the Missouri Court of Appeals, Kansas City District, overruled appellant's timely filed Motion for Rehearing and Transfer to the Supreme Court of Missouri. Thereafter, the Supreme Court of Missouri, on May 12, 1975, denied appellant's timely filed application to transfer said cause to the Supreme Court of Missouri from the Missouri Court of Appeals, Kansas City District.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Kansas City District, is set forth at Appendix A to this Statement.

JURISDICTION

This is a suit for divorce brought originally in the Circuit Court of Jackson County, Missouri by Appellee, Nadine Godsy. During this proceeding the Trial Court entered a default judgment against appellant in the total amount of $100,000 alimony in gross, of $110,352.00 in the form of permanent alimony, attorney's fees, suit money, in addition to One Hundred Fifty Dollars per week child support. The default judgment was taken against appellant without appellant ever having been notified to appear for a hearing on the divorce matter (it is contested whether he had been notified as to whether there was to be a hearing on the matters relating to temporary support), and without appellant or his counsel being present at the hearing wherein the default judgment was taken. A Notice of Appeal to this Court was filed in the Missouri Court of Appeals, Kansas City District on July 28, 1975, said Court being the Court wherein the Court is possessed of the Record, all pursuant to Rule 10 of the Rules of this Court. A copy of the Notice of Appeal to the Missouri Court of Appeals, Kansas City District is attached to this Jurisdictional Statement as Appendix B.[1] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(2). Cases which sustain the jurisdiction of this Court include *Dohnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Fiske* v. *Kansas,* 274 U.S. 380 (1927); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313 (1930); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673 (1930); *Railway Express Agency* v. *Virginia,* 336 U.S. 106 (1949); *Lathrop* v. *Donohue,* 367 U.S. 106 (1961).

1. A timely Notice of Appeal was also filed with the Supreme Court of Missouri on or about July 29, 1975, should this Court determine under its Rules that this Court is the Court "possessed of the Record".

Alternatively, should this Court determine that an appeal does not lie under 28 U.S.C. 1257(2), appellant respectfully moves this Court to treat this Jurisdictional Statement as a Petition for Certiorari. 28 U.S.C. 2103. Cases which sustain this alternative procedure are *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Slagle* v. *Ohio,* 366 U.S. 259 (1961).

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether Missouri Court of Appeals, Kansas City District, Rule F.01 as applied to this appellant by said Court denied appellant due process of law when appellant's cause on appeal was dismissed by the Court without notice to appellant, without argument or briefs by either party and without opportunity to supplement the record as to this issue, all in violation of appellant's rights under the Fourteenth Amendment to the United States Constitution. *E.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* ..... U.S. ....., 95 S.Ct. 719, 42 L.Ed.2d ....., ... (1975); *Goss* v. *Lopez,* ..... U.S. ....., 95 S.Ct. 729, 42 L.Ed.2d .....; *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; *Baldwin* v. *Hale,* 1 Wall. 223, 233.

2. Whether appellant was denied due process of law when, without notice, without opportunity to be heard, and without the opportunity to be present and to be represented by counsel, the Court, apparently pursuant to Rule 61.01, Missouri Rules of Civil Procedure (which has no provision to give notice to a party), entered a default judgment against appellant in an amount exceeding $110,000.

STATE STATUTORY PROVISIONS INVOLVED

Rule F.01 of the Rules of the Missouri Court of Appeals, Kansas City District, and Rule 61.01, Rules of Civil Procedure, Supreme Court of Missouri, which are set forth verbatim at Appendix C to this Statement.

STATEMENT

This appeal stems originally from an action brought initially against appellant in the Circuit Court of Jackson County, Missouri for divorce.

After the matter pended for a time appellee noticed up appellant for a hearing on February 15, 1973 with respect to certain motions for temporary support and the like which were pending in the case. There was no notice to appellant that the matter of the divorce itself would be taken up. Appellant's then counsel was to be out of town, so notified the appellee's attorney, and notified appellant not to be present. An associate lawyer of appellant's then attorney appeared on February 15, 1973 before the Trial Court, applied for a continuance on behalf of appellant. The application for continuance was denied (Tr. pp. 7-8).[2] The Court then and there—without notice to appellant or his counsel and in fact without appellant or his counsel even being present—struck appellant's pleadings and ordered a default hearing on the *divorce* to proceed immediately. Thereupon appellee obtained the divorce, a judgment for over $110,000 in attorney fees, suit money and alimony, and custody of the minor child, together with child support (Tr. pp. 59-60; 12).

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2. References Tr. are to the Trial Transcript.

On appeal, the parties briefed the substantive issues, and no issue was made whether the Appeals Court (Missouri Court of Appeals, Kansas City District) had jurisdiction. At oral argument appellee's counsel—for the first time—raised the issue that the *transcript* did not show that the Notice of Appeal had been filed in time, *viz.*, whether the Notice had been filed within 10 days after the date of overruling the motion for new trial. Counsel for appellant supplemented the record only as to that issue—whether the Notice had been filed within 10 days after the new trial motion had been overruled. Thereafter, the Court of Appeals dismissed appellant's appeal for lack of jurisdiction on another issue which had never been briefed or argued, and with no opportunity for appellant to show the Appeals Court that the actual record below (prepared by trial counsel against whom the default judgment had been taken and who had been subsequently discharged from representing appellant) reflected that the appeal had been properly perfected. The Appeals Court's Rule—F.01—provided that prior to dismissal the Court was required to give notice to appellant, but no notice was given in this case. A timely Motion for Rehearing and for Transfer to the Supreme Court of Missouri was made to the Kansas City Appeals Court on March 18, 1975 and denied on March 31, 1975. Thereafter, appellant made a timely Motion for Transfer to the Supreme Court of Missouri which was denied on May 12, 1975.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented are substantial and of broad public importance. They involve the fundamental guarantee of due process as provided by the Fourteenth Amendment to the United States Constitution and touch upon the rights of litigants everywhere. Most importantly, the

questions involved here touch upon the financial livelihood of this appellant, now facing financial ruin by reason of a judgment of over $110,000 rendered by default against him.

The first question involves the application of a Rule of the Missouri Court of Appeals, Kansas City District, which, as applied to this appellant, denied him his Constitutional rights under the Fourteenth Amendment to the United States Constitution. The second question concerns whether without notice and opportunity to be heard a Court may simply strike a party's pleadings and render a judgment against him in an amount of over $110,000. Under the doctrines as enunciated in *Dohnke-Walker Milling Co.* v. *Bondurant* and *Fiske* v. *Kansas,* cited *supra,* the Court has jurisdiction to hear this appeal. Admittedly, this first issue was not briefed nor argued in the Courts below because appellant had no opportunity to do so. (The second issue was briefed and argued.) *However,* at the first opportunity—namely, both in the Petition for Rehearing and Transfer to the Missouri Court of Appeals, Kansas City District, and in the Application to Transfer to the Supreme Court of Missouri—the issue was raised and denied by those Courts. Where a decision of a State Court has unexpectedly given rise to a federal question that an appellant had no previous opportunity to assert and could not have anticipated, the issue may be raised in the Supreme Court. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* and *Brinkherhoff-Faris Trust and Savings Co.* v. *Hill,* cited *supra.* Of course, Court orders establishing Rules governing practice in its Court are "statutes" within the meaning of 28 U.S.C. 1257(3). *Lathrop* v. *Donohue,* and *Railway Express Agency* v. *Virginia,* cited *supra.*

Alternatively, appellant respectfully requests that this Court consider the matter as a Petition for Writ of Certiorari should the Court decide an appeal does not lie. 28 U.S.C. 1257(2).

1. It Is a Violation of Appellant's Rights Under the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution to Dismiss His Appeal When No Notice or Opportunity to Be Heard Had Been Given to Appellant or His Counsel Prior to Such Dismissal.

Rule F.01, of the Special Rules of the Missouri Court of Appeals, provides that—as to "Dismissals of Appeals in Civil Cases"—when for any violation of its "Rules an appeal is to be dismissed, reasonable notice will be given the parties by notice to the responsible attorney . . ." (Appendix C). No notice was given appellant prior to such dismissal—apparently the Court deemed such rule not to apply in this situation.

However, before one's rights or property is taken from him, due process requires a hearing prior to the seizure and forfeiture. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* ..... U.S. ....., 95 S.Ct. 719, 42 L.Ed.2d .....; *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406; *Goss* v. *Lopez,* ..... U.S. ....., 95 S.Ct. 729, 42 L.Ed.2d .....; *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90.

The Fourteenth Amendment requires notice and the opportunity for a hearing before one's interest in any type of property is taken away. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 1 Wall. 223, 233.

This right to be heard insures fair play to the indivual and protects his use and possession of property from arbitrary encroachment, minimizing unfair or mistaken

deprivations of property. "(T)he prohibition against deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference." See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 551.

"The requirement of notice and an opportunity to be heard raises no inpenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State will listen to what he has to say, substantially unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes* v. *Shevin,* 407 U.S. 67, 81.

And, the notice must be sufficient to offer the party subject to deprivation the opportunity to be heard, to prevent any unfair or mistaken deprivations of property. "Due process is afforded only by the kinds of notice and hearing that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property . . . ." *Fuentes, supra,* citing cases.

Here, it is respectfully submitted, had the Court given proper notice the record from a factual point of view could have been corrected and the appellant could have shown the Court it had jurisdiction. A key finding of the Appellate Court was that the Trial Court's setting aside of its earlier default judgment was not timely and was therefore ineffective. (It is important to note that in this Appellate Court only a transcript—and not the entire Trial Court file—is prepared and thus the Appellate Court does not necessarily have the entire record before

it. It did not in this case, it is respectfully urged.) If appellant had been given proper opportunity to meet this issue, he would have shown (as more particularly set out in his various motions for transfer and rehearing) that, in fact, the Trial Court had jurisdiction to set aside its prior order. (Appellant's Motion for Rehearing or Transfer made to the Missouri Court of Appeals, Kansas City District, is attached to this Statement as Appendix D.) The same allegations were made in the application to transfer to the Missouri Supreme Court. From a strictly legal point of view, if appellant had been given proper opportunity to be heard, he could have pointed out to the Court that, under Missouri law, Section 452.070, Missouri Revised Statutes, a Court may modify a divorce judgment at any time and therefore the appeal was timely.

2. It Was a Violation of Appellant's Rights Under the Fourteenth Amendment to the United States Constitution for the Trial Court to Apply the Provisions of Rule 61.01, Rules of the Supreme Court of Missouri, Which Has No Provision for Notice and Hearing, So As to Strike Appellant's Pleadings and to Render a Default Judgment Against Him in an Amount Exceeding $110,000.00.

Rule 61.01 of the Rules of the Supreme Court of Missouri (in effect on the date of default, February 15, 1973), as more particularly set out in Appendix C, does provide that a Court may strike the pleadings of a party if a party does not make proper discovery. 61.01(b)(3) and 61.01(d). However, no notice that such an action would be taken was even given the appellant. (There was a motion to strike the pleadings on file based upon failure to pay child support—but there is no provision in Missouri law for this. In any event, this particular motion was not noticed up on the date in question as only "Motions

to Modify" were to be heard on February 15, 1973.) Moreover, there was never any allegation that appellant had not made discovery. Under all of these facts, including application of a facially unconstitutional statute, appellant was denied due process of law. The cases cited *supra* on the requirement of adequate notice and an adequate hearing with counsel are applicable here. As was said in *Krieber* v. *Krieber,* 420 S.W.2d 376 at p. 379:

> "Notice and a hearing, or an opportunity to be heard, have long been considered essential to due process, to a decision on the merits of a cause and to the deprivation of rights and property."

Finally, the Appellate Court had jurisdiction to hear this case as outlined above in the discussion of Question 1. If Missouri law is properly applied to this cause, appellant's notice of appeal was timely. This Court may properly take jurisdiction of this matter and should overturn this $110,000.00 default judgment.

In conclusion, each of the Questions presented is so substantial as to require plenary consideration, with brief on the merits and oral argument, for their resolution.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

JAMES R. WYRSCH
HENRY H. FOX, JR.
1050 Home Savings Building
Kansas City, Missouri 64106
Telephone: (816) 221-0080
Attorneys for Appellant

APPENDIX

APPENDIX A

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NADINE GODSY,
Plaintiff,

vs.

SHERMAN M. GODSY, JR.,
Defendant.

Juvenile & Domestic Relations
Division No. 8
Circuit Court No. 749,413

Judgment Entry and Decree of Divorce

Comes now on this 15th day of February, 1973, the plaintiff by and through her attorneys', Frank S. Krenzky and James R. Hunsucker and the defendant by his attorneys' Jones & McDaniel, and Jack Sims, appearing before the Court and the Defendant by his attorney requested a continuance in the above styled matter. After an oral hearing in which the defendant by his attorney and the Plaintiff by her attorneys were heard, the Court refused to grant a continuance and ordered this matter for trial.

This cause having come on for a hearing and being submitted to the Court, and all evidence heard and being advised the premises, the Court disposed of preliminary motions now pending in this matter.

1. The motion of James R. Hunsucker, for attorney's fees was sustained by the evidence introduced. James R.

Hunsucker was granted an attorney's fee in the amount of $4,320.00.

2. Defendant's motion to cite Plaintiff for contempt was denied and Defendant's Motion to Modify Custody also denied.

3. Motion for Contempt against the Defendant filed by the Plaintiff is considered moot and dismissed.

4. Plaintiff's Motion for Additional Temporary Alimony and Child Support is considered moot and dismissed.

5. Plaintiff's Motion to Strike Defendant's Pleading is sustained.

Evidence was heard on the Plaintiff's petition for a decree of Divorce and the Court after hearing the evidence and being satisfied that the Plaintiff was the innocent and injured party and was entitled to the relief prayed for in plaintiff's petition. ORDERS, ADJUDGES AND DECREES that plaintiff be and hereby is absolutely and forever divorced from the bonds of matrimony existing between the Plaintiff and Defendant. That plaintiff be awarded the care, control and custody of Gary S. Godsy, age (7) years the minor child born of the marriage. That the defendant is ordered to pay child support in behalf of the said minor child to the plaintiff in the sum of $150.00 per week; that the Defendant is ordered to pay the Plaintiff the sum of $100,000.00 alimony in gross; that the plaintiff is awarded attorney's fees in the amount of $5,-932.00 payable by the defendant; that the plaintiff is awarded suit money in the amount of $100.00 payable by the defendant. The defendant is granted privilege of reasonable visitation with Gary S. Godsy, the minor child of the marriage.

That costs be taxed against the defendant and execution shall issue therefore.

Dated this 15th day of February, 1973.

/s/ Lewis W. Clymer
Circuit Court Judge

NO. KCD 26,808

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Plaintiff-Respondent,

vs.

SHERMAN M. GODSY, Jr.,
Defendant-Appellant.

Opinion of the Missouri Court of Appeals,
Kansas City District

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY
Honorable Lewis W. Clymer

(Filed March 3, 1975)

BEFORE PRITCHARD, P.J., SWOFFORD, J. and SOMERVILLE, J.

PER CURIAM

This is a divorce action wherein the defendant (husband) seeks to appeal from a judgment entered in favor of the plaintiff (wife).

At the very threshold of appellate review this court is faced with a primal question of profound and possibly

conclusive significance. Does this court have jurisdiction to entertain the husband's "appeal"?

The scope of this court's duty to inquire into and determine its jurisdiction in this case, even though none of the parties have directly questioned the matter, finds clarity of expression in Taney County v. Addington, 296 S.W. 2d 129, 129[1] (Mo. App. 1956):

> "Appellate jurisdiction may not be conferred by waiver, acquiescence or even express consent [Collier v. Smith, Mo. App., 292 S.W. 2d 627, 630(4), and cases cited in footnote 8; Bowman v. Phelps County, Mo. App., 36 S.W. 2d 414 (3)]; and, although (as in the instant proceeding) none of the parties have questioned our appellate jurisdiction, it becomes our initial duty in each case to inquire into and determine our jurisdiction, sua sponte. Perkins v. Burks, Mo., 61 S.W. 2d 756, 757(1); State ex rel. and to Use of Hickory County v. Davis, Mo. App., 292 S.W. 2d 322 (1); Fort Osage Drainage Dist. of Jackson County v. Jackson County, Mo. App., 264 S.W. 2d 792(1)."

With the above admonition in mind, certain salient controlling events bearing upon determination of this court's jurisdiction are hereafter chronologized. The judgment appealed from was entered by the trial court on *February 15, 1973*. The husband filed a timely motion for a new trial on *February 28, 1973* . On *March 16*, 1973, the trial court overruled the husband's motion for a new trial. The trial court, on its own motion, on *March 26, 1973*, vacated its order of March 16, 1973, overruling the husband's motion for a new trial. Thereafter, on *May 29, 1973*, the trial court again overruled the husband's motion for a new trial. The husband filed his notice of appeal in the trial court on *June 6, 1973*. The husband

at no time ever sought a special order from this court to appeal from the judgment complained of as provided in Rule 81.07(a) and the time to do so thereunder has long since expired.

The above events, and their sequence, are strikingly similar to those in Bank of Thayer v. Kuebler, et al, 219 S.W. 2d 297, 298-299 (Mo. App. 1949), an action for "replevin" and "damages", wherein defendants-appellants' "appeal" was dismissed for lack of appellate jurisdiction because they had failed to file their notice of appeal "within the time required by law". Consequently, this court takes the liberty of quoting at length from Bank of Thayer v. Kuebler, et al, supra, and interpolating in the text thereof in brackets, at appropriate places, the dates of corresponding events in this case and Rules of Civil Procedure (substantively the same as those portions of the code sections and statutes cited and relied on therein) prevailing at the time of the corresponding events:

> "[T]here are certain positive limitations in the provisions of the Code beyond which no court is authorized to extend its discretion. One of these is that the court 'may not enlarge the period for filing a motion for or granting a new trial, or for commencing an action or taking an appeal as provided by this code.' Code, Sec. 6(b), Mo. R.S.A. §847.6(b) [Rule 44.01(b)]. Another is that no appeal is effective without a notice of appeal, filed either within ten days after the judgment becomes final, Code, Sec. 129, Mo. R.S.A. §847.129 [Rule 81.04], or within six months after the judgment has become final, under special order of the appellate courts on application, Code, Sec. 130, Mo. R.S.A. §847.130 [Rule 81.07(a)]. Without timely notice of appeal under one or the other of such sections the appellate court acquires no jurisdiction.

"[3, 4] However, appellants contend that they did file a proper notice of appeal, and that the same was timely. The matter requires our careful consideration of each step taken and its nature, time and effect. It must be conceded that defendants' motion for new trial filed November 29, 1947 [February 28, 1973], was proper and timely since the judgment was entered November 19, 1947 [February 15, 1973]. By the timely filing of such motion the finality of the judgment was suspended. When, within 90 days after the motion for new trial was filed, the court disposed of it by overruling it (February 7, 1948) [March 16, 1973], the judgment then became final, Code, Sec. 116, Mo. R.S.A. §847.116; Rules of Supreme Court, Rule 3.24 [Rule 81.05(a)]. Thereafter the court had no further authority to disturb the judgment or its finality. The 30 day period following the date of the judgment during which the court had control of the judgment had expired. Rules of Supreme Court, rule 3.25 [Rule 75.01]. The court term is no longer considered in computation of time in such matters under the new Code, Code, Sec. 6(c), Mo. R.S.A. §847.6(c) [Rule 44.01(c)]. The 90-day period from the date the motion for new trial was filed, at the expiration of which the motion, if not yet disposed of, is deemed overruled and the judgment thereby becomes final, does not apply here because the motion was overruled by the court within that period, Code, Sec. 118, M.R.S.A. §847.118; Rules of Supreme Court, rule 3.24 [Rule 81.05(a)].

"Hence, the order of the court on February 26, 1948 [March 26, 1973], setting aside its previous order of February 7, 1948 [March 16, 1973], overruling the motion for new trial, and entering a new order as of February 26, 1948 [May 29, 1973], overruling that motion, was without jurisdiction and is null and void. As was said in Camden

v. St. Louis Public Service Co., 239 Mo. App. 1199, 206 S.W. 2d 699, 703: 'We know of no lawful method which would authorize the trial court to "hold in abeyance" the judgment which had become final.' It follows that the notice of appeal filed March 3, 1948 [June 6, 1973], from a judgment that had become final February 7, 1948 [March 16, 1973], was not filed within ten days after the judgment became final and was, therefore, too late, Code, Sec. 129, Mo. R.S.A. §847.129 [Rule 81.04]. Neither the trial court nor this court has power to enlarge that period under that section, Code, Sec. 6(b), Mo. R.S.A. §847.6(b) [Rule 44.01(b)]. Woods et al v. Cantrell, 356 Mo. 194, 201 S.W. 2d 311; Camden v. St. Louis Public Service Co., 239 Mo. App. 1199, 206 S.W. 2d 699, 703; Gockel v. Jenkins, Mo. App., 210 S.W. 2d 691; McPike v. St. Louis County Bank, Mo. App., 193 S.W. 2d 961; Rosbrugh v. Motley, et al., Mo. App., 216 S.W. 2d 165, 170."

For the reasons stated in Bank of Thayer v. Kuebler, et al, supra, and the Rules of Civil Procedure interpolated therein, the husband's notice of appeal in this case was not filed within the required time and therefore this court has no jurisdiction to entertain his "appeal".

In spite of a natural inclination otherwise, nothing is to be gained by lamenting at length about the harsh result effected by this decision. The question of whether jurisdiction is lodged in this court, in view of the facts presented by the record, is controlled by settled principles of law and Rules of Civil Procedure which this court is not at liberty to ignore or evade.

Appellant-husband's "appeal" must be and is hereby dismissed.

All concur.

APPENDIX B

No. KCD 26,808

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Respondent,

vs.

SHERMAN M. GODSY, JR.
Appellant.

Notice of Appeal to Supreme Court of the United States

(Filed July 28, 1975)

Notice is given that Appellant appeals from the judgment entered in this action on the 3rd day of March, 1975, from the Order of this Court on March 31, 1975 overruling Appellant's Motion for Rehearing and Transfer, and the Order of the Supreme Court of Missouri denying Appellant's Application to Transfer on May 12, 1975, all in accordance with Rule 10, Rules of the Supreme Court of the United States.

The party taking the Appeal is Appellant, Sherman Godsy. All of the judgment entered in this cause on March 3, 1975, as well as the subsequent Orders overruling Motions for Rehearing and Transfer, are appealed from. Appellant takes that Appeal pursuant to 28 USC 1257(2) and 28 USC 2101(c).

Original Signed by James R. Wyrsch
James R. Wyrsch
Attorney for Appellant
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

Dated this 28th day of July, 1975.

Copy of the above and foregoing Notice of Appeal delivered on this 28th day of July, 1975, to: THAINE Q. BLUMER, 2010 Traders National Bank Building, Kansas City, Missouri, Attorney for Respondent.

Original Signed by James R. Wyrsch
Attorney for Appellant

APPENDIX C

Rule F.01, Missouri Court of Appeals, Kansas City District

Rule F.01 Dismissal of Appeal in Civil Cases

In civil cases, no formal dismissal docket will be published. When, for any violation of the Rules, an appeal is to be dismissed, reasonable notice will be given the parties by notice to the responsible attorney, and the appeal will then be dismissed by order, absent leave to remedy the defect or failure granted upon good cause shown. Criminal cases will be dismissed in accord with Rule 28.09. (Adopted Nov. 1, 1973, effective Jan. 1, 1974.)

Rule 61.01, Rules of Civil Procedure, Supreme Court of Missouri

RULE 61. ENFORCEMENT OF DISCOVERY BY PARTIES

61.01 Motion for Order Compelling Discovery

(a) Motion to Compel Answer—Costs of. Upon the refusal of a party to answer any interrogatory submitted under Rule 56, the proponent of the question may move

the court, on reasonable notice to all persons affected thereby, for an order compelling an answer. If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party to pay to the examining party the amount of the court costs incurred in obtaining the order. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party to pay to the refusing party the amount of the court costs incurred in opposing the motion.

(b) Refusal to Obey—Consequences of. If any party, or if an officer, director, general manager, managing agent or partner thereof refuses to obey any order made under paragraph (a) of this Rule requiring him to answer designated questions, or an order made under Rule 58 to produce any document or other thing for inspection, copying or photographing, or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 60, requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence

designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(c) Refusal to Make Admission—Consequences of. If a party, after being served with a request under Rule 59 to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, files and serves a written sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Willful Failure to Appear—Consequences of. If a party, or if the party served is a public or private corporation, a partnership or other unincorporated association, an officer, director, general manager or managing agent or partner thereof, willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to return answers to interrogatories submitted under Rule 56, after proper service of such interrogatories, the court on motion and notice may strike out all or part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.
(Amended March 6, 1962, eff. Oct. 1, 1962.)

APPENDIX D

No. KCD 26,808

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Plaintiff-Respondent,

vs.

SHERMAN M. GODSY, JR.,
Defendant-Appellant.

Motion for Rehearing and Application to Transfer From Court of Appeals to the Supreme Court

(Filed March 18, 1975)

Appellant moves this honorable court for rehearing in the above cause or to transfer said cause to the Supreme Court of Missouri on the following grounds:

1. The court entered an order on March 3, 1975 dismissing this appeal. However, Rule F.01 provides that reasonable notice be given the parties prior to the dismissal. There was no notice given in this case and this court should set the matter for rehearing.

2. The court in its opinion inadvertently misinterpreted and overlooked certain facts concerning this matter. Appellant would respectfully request that in the alternative, this case be remanded for further findings of facts and conclusions of law at the trial court level. Specifically:

(a) The order entered by Judge Clymer on March 16, 1973 overruling the motion for new trial was not in effect a final judgment. A final judgment is final only when all of the rights of the parties

in the action have been determined. When defendant filed his motion for new trial on February 28, 1973, he incorporated in Point I the fact that the court had erred in failing to sustain defendant's motion to set aside the default judgment. A copy of the motion to set aside default judgment (filed February 23, 1973) is attached hereto. Appellant conceded that this motion was not a part of the transcript on appeal. Appellant, however, wishes the court to consider it because of the harsh consequences of the dismissal on appeal, together with the fact that neither party argued the specific point which prompted this court to enter a dismissal of the appeal. The court's order of March 16, 1973 simply states that the motion for new trial is overruled. However, incorporated in said motion was the motion to set aside the default judgment. In *Herndon* v. *Ford*, 470 S.W.2d 168 (App. 1971), a naked record recital that a motion for directed verdict was sustained did not constitute a final judgment. Since the court's overruling the motion for new trial did not rule on grounds in connection with the motion for new trial, it was not a final judgment which was appealable.

(b) Defendant again urges the court to remand to the trial court for further findings of fact and conclusions of law. However, the appellant can tell the court that his examination of the original file of this cause shows that a journal entry was not prepared until sometime after March 15, 1973. The journal entry that does appear shows on its face a alimony judgment $100.00 and further shows an additional entry not contained in the original entry (Tr. pp. 59-60), namely, that the motion for additional temporary child support and alimony was overruled as moot. The file clearly shows that this journal entry

was not prepared and filed until at least March 15, 1973, even though it is dated February 15, 1973. Again, there is nothing in the record at this point to show the court these facts, but the court may rehear the matter and order an additional supplemental transcript to be prepared in connection with this matter. In *Aronberg* v. *Aronberg*, 316 S.W.2d 675, the court stated:

"The important principle to remember in determining the court's authority to correct its records is that it can only correct the record so as to reflect the action actually taken by the court at the time it entered its order or judgment. A nunc pro tunc entry can only be employed to correct a clerical mistake or misprision of the clerk. Such an entry cannot be invoked to correct a mistake or oversight of the judge, nor be used to correct judicial errors, nor to render a judgment different from that actually rendered, even though the judgment actually rendered was not the judgment the judge intended to render. *Wiggins* v. *Perry*, 343 Mo. 40, 119 S.W.2d 839, 126 A.L.R. 949; *Campbell* v. *Spotts*, 331 Mo. 974, 55 S.W.2d 986; *Clancy* v. *Herman C. G. Lyties Realty Co.*, 321 Mo. 282, 10 S.W. 2d 914; *Burnside* v. *Wand*, 170 Mo. 531, 71 S.W. 337, 61 L.R.A. 427; *Arkansas-Missouri Power Company* v. *Hamlin*, Mo.App., 288 S.W.2d 14; *Schenberg* v. *Schenberg*, 307 S.W.2d 697."

Therefore, the facts in this case are that a final judgment was probably not entered until sometime on March 15 or March 16, 1973

(c) The clear provisions of Section 452.070, Missouri Revised Statutes, did permit the court to have in this matter continuing jurisdiction. Section 452.070 provided (at the time of this action) "The court, on

the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper . . . ." Clearly, under this provision Judge Clymer had authority on March 26, 1974 to enter the order that he did.

(d) Rule 74.78 of the Rules of Civil Procedure provides that upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail upon every party affected thereby who is not in default for failure to appeal and who is not in court in person or by attorney at the time of the entry of such order or judgment. Appellant states to the court that his attorney was present and he was therefore entitled to have notice of the journal entry which was prepared by appellee's counsel on March 15 or 16, 1973. Under these provisions, the court has six months from the entry of the order or judgment in which to set aside the order or judgment. No copy of the journal entry was ever furnished to appellant or his counsel. Under this provision, Judge Clymer still had continuing jurisdiction to set aside his earlier order.

(e) This court should enter its order to supplement the transcript to determine exactly what did occur in the trial court and order rehearing of the matter so that a proper determination of this matter can be made.

A. The question involved in this case is of such general interest or importance that the final decision thereon should be made by the Supreme Court of Missouri, and in support thereof appellant states:

1. That the court's holding that a trial court under Section 452.070, Missouri Revised Statutes, could not have

made continuing orders with respect to its prior orders is of general interest or importance.

B. The decision of this court appears to be in direct conflict with the statute.

WHEREFORE, Appellant respectfully requests this Court to grant him a rehearing in this case, or to transfer the cause to the Supreme Court en banc.

Respectfully submitted,

Henry H. Fox, Jr. and James R. Wyrsch
Original Signed by James R. Wyrsch
By James R. Wyrsch
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Appellant

Copy of the above and foregoing Motion for Rehearing and Application to Transfer From Court of Appeals to the Supreme Court served upon Appellee by delivering same to: THAINE Q. BLUMER, 2010 Traders National Bank Bldg., Kansas City, Missouri, on this 18th day of March, 1975.

Original Signed by James R. Wyrsch
James R. Wyrsch

Order Overruling Motion for Rehearing

MISSOURI COURT OF APPEALS
Kansas City District
10th Floor Jackson County Courthouse
Kansas City, Mo. 64106

Area Code 816
881-3787

March 31, 1975

Mr. John C. Russell
10216 E 72nd
Kansas City, Missouri 64133

In re: Godsy v Godsy
KCD 26808

Dear Sir:

The Court has this day overruled Motion for rehearing and Transfer to the Supreme Court is denied in the above cause.

Yours very truly

/s/ M. L. Thomas
Clerk

18.
cc:

Mr. R.C. Jones, 1103 Grand-Suite 221, K.C. Mo. 64106

Mr. James R. Wyrsch, 1006 Grand-Suite 1050, K.C. Mo. 64106

Mr. Frank R. Krenzky, 620 Argyle Bldg., K.C. Mo. 64106

Mr. Thaine Q. Blumer, 2010 Traders Bldg. 1125 Grand-K.C. Mo. 64106

Order Overruling Motion to Transfer

Supreme Court No. 59057

Court of Appeals No. 26808

IN THE SUPREME COURT OF MISSOURI

May Session 1975

Nadine Godsy,
Respondent,

vs. TRANSFER

Sherman M. Godsy, Jr.,
Appellant.

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the KANSAS CITY DISTRICT OF THE MISSOURI Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1975, and on the 12th day of May 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of May 1975.

..... Clerk.

..... D. C.